SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 364

ST. JOE PAPER COMPANY,

Petitioner,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Respondents.

BRIEF FOR RESPONDENT HARTFORD ACCIDENT AND INDEMNITY COMPANY, A CORPORATION, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Respondent Hartford Accident and Indemnity Company, a corporation, under Rules 24 and 40 of this Honorable Court, respectfully submits that although it is fully aware that the reasons set forth in Rule 19 justifying the grant of a writ of certiorari to review a decision of a Circuit Court of Appeals are to be regarded as "neither controlling nor fully measuring the Court's discretion", no writ should issue here because

The Argument.

1. No case has been cited by Petitioner, and we have found none, standing authority for the proposition that "the giving of an instruction on an issue not made by the pleadings, not tried by the implied consent of the parties and erroneous as a matter of law" (page 8 of the petition), is such a departure "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 19 1(b)*

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* Indeed; for the reasons given and upon the strength of the authorities cited by the Circuit Court of Appeals, it is perfectly patent, upon remembering Rule 15(b) of the Federal Rules of Civil Procedure and the pages of the record now to be cited, that the matter of which Petitioner complains *was* "tried by . . . implied consent of the parties", that failure "to amend . . . (did) not affect the result of the trial of these issues", and that the instruction was *not* erroneous as a matter of law. (R. 580, 596, 598, 608, 612, 618-619, 621-622, 629-630, 632-634, 635-637, 639-640).

As well put by the Court of Appeals (the petition, page 20); "We note that prior to trial the court struck certain defenses involving this same issue. This does not change the fact that the evidence as adduced by the parties under the supervision of the court, developed this issue and the Defendants were entitled to have it submitted to the jury." (Because, inter alia, *a* "fraudulent or dishonest act" by Jones, knowledge of which the jury could have found St. Joe had, would *still* be present.)

After a certain portion of the matter contained in the just cited pages of the transcript of the record—all injected in the case by Petitioner itself—had been developed, the trial judge observed that "the jury is, I am sure, sensitive to the questions and to the answers given, and it will be completely up to the jury to evaluate the testimony." (R. 642-643).

(a) Actually, in order to determine whether, as Petitioner charges, the "issue" of which Petitioner complains was or was not "tried by the implied consent of the parties", resort to the evidence would be necessary; and "Granting of the writ would not be warranted merely to review the evidence. . . ." *Gentle Talking Pictures Corporation* vs. *Western Electric Co.*, 304 US 175, 58 S. Ct. 849, 82 L. ed. 1273, 1275; aff. 59 S. Ct. 116, 305 US 124, 83 L. ed. 81; reh. den. 59 S. Ct. 355, 305 US 675, 83 L. ed. 437.

(b) Petitioner further asserts that the instruction was "erroneous as a matter of law." (the petition page 8) Here there is no federal question; no decisional conflict among courts of appeals; no lower court ruling upon an important state or territorial question in any way conflicting with applicable state or territorial law. Therefore

> "We do not ordinarily review the holding of a court of appeals on a matter of state law, and we find no reason for departing from that tradition in this case."
>
> *Pierson vs. Ray, et al.*, US , 18 L. ed. 2d 288, 297, 87 S. Ct. , decided April 11, 1967, note 12.

2. Even a cursory reading of the petition recalls to mind the controlling principals of *Evelyn Rice vs. Sioux City Memorial Park Cemetery, Inc., et al.*, 349 US 70, 99 L. ed. 897, 904, 75 S. Ct. 614:

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principals, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

CONCLUSION.

It is deferentially urged that the instant petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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Certificate of Service.

I do hereby certify that on August 11, 1967, I deposited a copy of the foregoing brief in a United States mail box, with first class postage prepaid, addressed to counsel of record at their post office address; i. e., to Messrs. Chester Bedell and C. Harris Dittmar, at 1520 Barnett Bank Building, Jacksonville, Florida, 32202.

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